Supreme Court Case No. S 197503

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In the Matter of

GARY DOUGLASS GRANT

After an Opinion and Order by the Review Department Reversing in Part
a Recommendation of the State Bar Court's Hearing Department
State Bar Case No. 09-C-12232
Honorable Richard A. Platel, Presiding

OPENING BRIEF ON THE MERITS OF RESPONDENT GARY DOUGLASS GRANT ON THE DECISION OF THE STATE BAR COURT

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In Pro Per and Attorney for Respondent

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ISSUES PRESENTED FOR REVEIW

1. Whether a conviction for violation of Penal Code section 311.11(a) involves moral turpitude per se.

2. Whether the Review Department's recommended discipline of two years actual suspension with additional terms and conditions was appropriate in light of Respondent's[1] conviction with purported aggravating factors.

SUMMARY OF ARGUMENT

This matter addresses two issues: (1) whether a conviction for violation of Penal Code section 311.11(a) [unlawful possession of an image depicting individual under 18] involves moral turpitude *per se*, and (2) whether the Review Department's recommended discipline of two years actual suspension with additional terms and conditions was appropriate in light of Respondent's conviction with other aggravating factors.

The first issue, at least in connection with attorney disciplinary proceedings, appears to be a matter of first impression. Respondent argues below that a violation does not involve moral turpitude per se. Crimes involving moral turpitude, not involving dishonesty, include crimes that indicate a "general readiness to do evil." (*People v. Castro* (1985) 38 Cal.3d 301.) These are crimes that "are extremely repugnant to accepted moral standards, such as murder or *serious* sexual offenses." (*In re Lesansky* (2001) 25 Cal.4th 11 [emphasis added; internal citations omitted].)

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[1] Gary Douglass Grant and the State Bar have referred to Mr. Grant as the Respondent in all documents submitted during the pendency of this proceeding. Respondent is filing the opening brief on the merits pursuant to the Clerk's order that Respondent file the first brief.

That is, "they demonstrate 'moral depravity other than dishonesty: [e.g.,] *child molestation, crimes of violence, torture, brutality* and so on.'" (*Castro*, supra, 38 Cal.3d at p. 315.) (Emphasis added.)

Simple possession of child pornography does not rise to the level of these aforementioned depraved crimes for a number of reasons. First, someone convicted of section 311.11(a) is not involved in the manufacture and distribution of the matter. As such, it is analogous to persons involved in the distribution of narcotics versus the simple possession of narcotics. The former evinces a desire to corrupt, harm or offend others. (*People v. Ballard* (1993) 13 Cal. App. 4th 687, citing *Castro*, supra, 38 Cal.3d at 315.) The latter does *not* evince such intent.

A violation of section 311.11(a) also is not a crime involving moral turpitude per se because it does not in every case involve moral turpitude. It is possible for someone to be in possession of an image that is unlawful for purposes of child pornography laws; i.e., it depicts a minor, yet the image may not shock the conscience, appeal to prurient interest, or be patently offensive because it might depict a person on the cusp of majority. (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 246.) In addition, it is possible that a person could come into possession without the intent to possess or control child pornography. It is common for child pornography to be sent through e-mail, yet it is not always apparent to a computer user what is attached to an e-mail, especially when multiple attachments are included with an e-mail. After opening up an e-mail that has attached an unlawful image, even if the user deletes the e-mail, that image will remain in the user's computer cache for some period. Images in cache constitute possession or control for child pornography laws. (*Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402.) Not knowing explicitly what is attached to an e-mail that one opens up may

demonstrate laziness and/or negligence; it does not follow that it involves a desire to corrupt, harm or offend others. (*Ballard*, supra, 13 Cal. App. 4th 687, citing *Castro*, supra, 38 Cal.3d at 315.) For all of these reasons, as discussed more fully below, simple possession does not involve moral turpitude per se.

The second issue before this Court is whether the Review Department's recommended discipline of two years actual suspension with additional terms and conditions was appropriate in light of Respondent's conviction and aggravating factor. The State Bar asks that Respondent be disbarred; Respondent argues below that the Review Department correctly ruled that discipline involving an actual suspension is the proper disposition herein, although some period less than the recommended two years (and notwithstanding that Respondent has already been on interim suspension for 3 ½ years) is appropriate.

The primary reason suspension and not disbarment is appropriate is that the State Bar did not prove Respondent's conduct involved moral turpitude. In a nutshell, the State Bar did not show that Respondent every sought out to possess or control the images: there is no evidence that Respondent downloaded any images from a website dedicated to or known for child pornography (RT, Vol. I, pp. 99:25-100:3), no evidence that Respondent posted any images onto a public bulletin board (RT, Vol. I, pp. 117:17-20), no evidence that Respondent shared any images using a peer-to-peer program (RT, Vol. I, pp. 122:20-123:3), and no evidence that Respondent communicated with minors, either through instant messaging, e-mail or otherwise. (RT, Vol. I, pp. 117:1-15.)

The State Bar had possession of a forensic report and access to the disputed images weeks in advance of trial, whereas Respondent only obtained a copy of the report at trial and never had access to the disputed

images during this disciplinary proceeding (because all documents were subject to a Protective Order that prohibited their disclosure, which Order the Orange County District Attorney's office and Immigration and Customs Enforcement (ICE) ignored). The Review Department correctly ruled these documents were inadmissible because the State Bar did not use the court's processes to obtain these documents. (Rev. Dpt. Opn., at 8.) The State Bar did not have an expert testify to the apparent or actual age of the persons depicted in the images; rather, it offered the testimony of a computer technician to speak to the ages of the person's depicted in the images. The Review Department correctly ruled that this testimony was inadmissible under the secondary evidence rule and improper lay opinion. (*Id.*, at 8-9.)

The State Bar contends that even if the weight of the evidence, or lack thereof, does not support a finding of moral turpitude, Respondent's purported lack of candor in his testimony concerning his discharge from the United States Army Reserve should be sufficient to disbar him; a contention to which the Review Department did not agree. (Rev. Dept. Opn., at 9-11.) For any number of reasons, this contention is baseless and the findings and conclusions should be disregarded.

The State Bar improperly obtained Respondent's military record in violation of the federal Privacy Act (5 U.S.C. § 552a). Further, the one document admitted showed that Respondent had resigned; nothing more. (Ex. 15.) Respondent testified as to several factors leading to his resignation; the court focused on only one factor, and improperly weighted or dismissed the other testimony. Moreover, even if Respondent's testimony "was less than fully candid with the Court, his lapses of candor were not so egregious as to require a finding that Standard 1.2(b)(vi) applied." (*In re Deierling* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 552.) Rather, the factors in mitigation outweigh the purported factor in

aggravation.

The Review Department correctly imposed a period of actual suspension, with conditions; however, some period less than two years would be the appropriate discipline. Other members convicted of a violation of section 311.11(a), whose conduct demonstrated an interest in children and child pornography; that is, conduct far more egregious than that of Respondent, received suspensions far less than that requested by the State Bar. In fact, in a recent matter, the member received a 30-day actual suspension. Thus, the State Bar overreached when it requested disbarment, and the two year actual suspension is excessive in light of other members' discipline.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Prior to 2008, Respondent had viewed *adult* internet pornography. During the period when he engaged in that conduct, Respondent received two e-mails that were unsolicited, and *after* he opened them he discovered that they included images which he believed depicted minors. Upon realizing this, Respondent immediately deleted the e-mails and the images attached to the e-mails. However, because of the way computer systems work, the images remained permanently on his computer. (Rev. Dept. Opn., pp. 6-7, 10-11; RT, Vol. II-60:18-67:7, 186:21-187:15, 188:10-192:5; RT, Vol. IV-34:5-36:9, 40:10-45:1, 92:16-93:15.)

In August 2008, Respondent was charged with three counts of violating Penal Code section 311.11, subdivision (a). Respondent pleaded not guilty. Subsequently, the District Attorney filed an Amended Complaint, dismissing two of the counts.

In January 2009, the Third Appellate District decided *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402

("*Tecklenburg*"). The court concluded that if an unlawful image is displayed on a computer screen, its display *is* knowing possession or control that violates Section 311.11(a). (*Id.* at 1419.) The court further stated that knowledge from actively downloading and saving child pornography to a computer, printing it or emailing it, or knowledge or manipulation of TIF's or cache files, "is *not* an essential predicate for knowing possession and control of computer generated images of child pornography" under Section 311.11(a). (*Id.* at 1419, fn. 16 [emphasis added].)

Shortly after *Tecklenburg* was decided, in February 2009, Respondent's criminal defense attorney, Charles Spagnola, advised that the recent decision in *Tecklenburg* made the display of an image *alone a* violation of section 311.11(a); in other words, making it a strict liability crime.[2] (RT, Vol. II-64:14-67:7, 186:21-187:1; Vol. IV-21:22-25:18, 92:16-93:15; Ex. II.) Consequently, in April 2009, Respondent pleaded guilty to a single count of a violation of Section 311.11(a). The court suspended imposition of sentencing, placed Respondent on three years probation, the terms and conditions which included, inter alia, that Respondent serve 90 days in a city jail work furlough program. (State Bar's Pretrial Statement, dated June 21, 2010, p. 2.)

On September 29, 2009, the State Bar filed its "Brief Addressing Moral Turpitude Issue." (Brief, dated September 29, 2009.)

On September 30, 2009, the State Bar transmitted Respondent's conviction to the State Bar Court.

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[2] It is possible that the court where the criminal matter was pending would not have interpreted *Tecklenburg* the same as Respondent's criminal defense attorney did. A recent Westlaw search reveals no less than 22 citing references to *Tecklenburg*. In February 2009, however, there were *no* citing references and, therefore, there was no guidance as to how courts would interpret the case.

On October 28, 2009, the Review Department of the State Bar Court issued an order placing Respondent on interim suspension, and reserving classification of section 311.11(a) pending a response, if any, by Respondent to the State Bar's brief.

On November 17, 2009, and notwithstanding the fact that the State Bar's brief was unopposed, the Review Department issued its Order, holding that violation of Section 311.11 (a) "is a crime which may or may not involve moral turpitude." (Order, dated November 17, 2009.)

On December 29, 2009, the Review Department referred this matter to the Hearing Department for "a hearing on whether the facts and circumstances surrounding the violation involved moral turpitude or other misconduct warranting discipline." (State Bar's Pretrial Statement, dated June 21, 2010, p. 3; Order dated December 29, 2009.)

On January 14, 2010, the matter was assigned to the Honorable Richard A. Platel, Judge presiding. On February 18, 2010, the court set a trial date of July 6, 2010.

The State Bar did not conduct any discovery; it did not subpoena the reports, or take any other formal steps to obtain the reports covered under the Protective Order. (RT, Vol. I-108:11-109:8, I-126:10-11.) The State Bar also did not subpoena the images. (RT, Vol. I-108:11-109:8.)

In its Pretrial Statement, the State Bar stated that the images in question were in the possession of the Orange County District Attorney's office, that the District Attorney's office had agreed to submit the images to the State Bar Court for trial subject to a protective order, and that the State Bar and the District Attorney's office were in the process of agreeing on the language of the protective order. (State Bar's Pretrial Statement, dated June 21, 2010, pp. 5-6.)

The State Bar subsequently changed its position and stated in a

Supplemental Pretrial Statement that it would not obtain the images for trial or introduce them at trial. (State Bar's Supplemental Pretrial Statement, dated June 22, 2010, pp. 1-2.)

On July 1, 2007, Trial Counsel advised Respondent's counsel that: "**No copies of <u>any</u> images forensically found on Grant's computers and other storage media were ever provided to this office at any time, in any form or medium by any investigative, prosecutorial, or other law enforcement agency.**" (Motion in Limine No. 1, Ex. "C," p. 1 [bold and underlining in original].)

On July 3, 2007; two days *after* advising Respondent's counsel that the State Bar did not have access to the images and that they had never been provided to the State Bar, Trial Counsel went to the District Attorney's office and viewed the images in the DA's office. (RT, Vol. I-125:5-127:2.)

Commencing on July 6, 2010 and continuing through July 13, 2010, inclusive, the trial in the within matter was held.

On October 1, 2010, the court issued its Decision Including Disbarment Recommendation and Order of Inactive Enrollment (hereafter "Hrg. Dept. Rec.").

On October 26, 2010, Respondent filed his Request for Review.

On June 15, 2011, oral argument was held before the Review Department. On September 12, 2011, the Review Department issued its Opinion and Order ("Rev. Dept. Opn."). The Opinion reversed the court's finding that Respondent's conduct involved moral turpitude, and reversed the recommendation of disbarment, instead imposing an actual suspension of two years, with additional terms and conditions.

On December 22, 2011, the State Bar petitioned this Court for review of the Opinion and Order. On January 1, 2012, Petitioner filed his Answer. On February 22, 2012, this Court accepted the matter for review.

To date, no party has filed a brief on the merits.

ARGUMENT

I. A VIOLATION OF SECTION 311.11(a) DOES NOT INVOLVE MORAL TURPITUDE PER SE

The first issue before the Court is whether a violation of Penal Code section 311.11(a) involves moral turpitude per se. "'Moral turpitude' is an elusive concept incapable of precise general definition." (*In re Higbie* (1972) 6 Cal.3d 562, 569.) The "most common definition of an act of moral turpitude is one that is 'contrary to honesty and good morals.'" (*In re Scott* (1991) 52 Cal.3d 968, citing *Young v. State Bar* (1990) 50 Cal.3d 1204, 1217-18.) It is also frequently described as any act of "baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (See Rev. Dept. Opn., p. 3, citing *In re Craig* (1938) 12 Cal.2d 93, 97.) An offense involves moral turpitude per se "if the conviction would *in every case*" evidence bad moral character." (*Lesansky*, supra, 25 Cal.4th 11, citing *In re Hallinan* (1954) 43 Cal. 2d 243, 249.) As discussed below, violation of section 311.11(a) does not involve the depravity seen in these cases nor does it involve moral turpitude in every instance. Thus, violation of section 311.11(a) does not involve moral turpitude per se.

A. Crimes Involving Moral Turpitude Demonstrate a Readiness to Do Evil; A Violation of Section 311.11(a) Does Not Inherently Demonstrate Such Readiness to Do Evil.

Crimes involving moral turpitude fall into two categories. The first

includes crimes in which *dishonesty* is an element (*i.e.*, fraud, perjury, etc.). (*People v. Castro* (1985) 38 Cal.3d 301.) The second "includes crimes that indicate a '*general readiness to do evil.*'" (*Castro, supra*, at 315.) (Emphasis added.) The court's Decision did **not** cite to or discuss *Castro* or its progeny; however, it is worth reviewing this line of cases to understand why violation of section 311.11(a) does not necessarily involve a readiness to do evil and, as discussed in the following Part II, why the facts and circumstances surrounding Respondent's conduct does not evince a readiness to do evil.

Crimes that indicate a general readiness to do evil include crimes "that are extremely repugnant to accepted moral standards such as murder or ***serious*** sexual offenses." (*Lesansky*, supra, 25 Cal.4th 11 [emphasis added; internal citations omitted].) These are "crimes which demonstrate 'moral depravity other than dishonesty: ***child molestation***, ***crimes of violence***, ***torture***, ***brutality*** and so on.'" (*Castro*, supra, 38 Cal.3d at p. 315.) (Emphasis added.)

"Serious sexual offenses" include: sexual battery (*People v. Chavez* (2000) 84 Cal.App.4th 25 (because it consists of the degrading use of another, against her will, for one's own sexual arousal); solicitation of a lewd act in public (*McLaughlin v. Board of Medical Examiners* (1973) 35 Cal.App.3d 1010); and child molestation (*Lesansky*, supra, 25 Cal.4th 11). Sexual offenses *not* meeting this "serious" standard include physical acts against someone; *e.g.*, statutory rape. (*Bernstein v. Board of Medical Examiners* (1962) 204 Cal.App.2d 378; *In re Safran* (1976) 18 Cal.3d 134 [misdemeanor conviction for annoying or molesting child under 18 not moral turpitude per se].)

In each instance where the crime involved moral turpitude, the act or

offense involved intent, and the act was against a person or a person's will. That is, the act involved "a desire to *corrupt*, [*harm*] or *offend others*." (*People v. Ballard* (1993) 13 Cal. App. 4th 687, citing *Castro*, supra, 38 Cal.3d at 315 [emphasis added].)

The State Bar will argue, and has argued, that because of the enduring nature of digital images, attorney discipline matters involving violations of child pornography laws must be treated in every instance with disbarment. (See Petition, pp. 14-15, citing *New York v. Ferber* (1982) 458 U.S. 747 and *Osborne v. Ohio* (1990) 495 U.S. 103, 111.) There can be no dispute that any harm or abuse to a child is serious or that the subject of unlawful images may suffer while an image circulates. It thus follows that a person involved in the manufacture or distribution of child pornography evinces the intent to corrupt, harm or offend the minor and, therefore, that the manufacture or distribution of child pornography likely involves moral turpitude per se. It does *not* follow, however, that a person convicted of possession, and nothing more, intended to come into possession of an unlawful image, or that the possessor of the image intended to harm anyone.[3] As with the simple

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[3] Non-sexual offenses further shed light on that conduct which is inherently morally turpitudinous, and that conduct which is not. Offenses indicating a readiness to do evil have included: terrorist threats (see *People v. Thornton* (1992) 3 Cal. App. 4th 419, 424 (because it involved the knowing infliction of mental terror on the victim); assault by means of force likely to produce great bodily injury (i.e., battery combined with additional elements) (see *People v. Elwell* (1988) 206 Cal. App. 3d 171); possession of heroin with intent to sell (see *People v. Castro* (1985) 38 Cal. 3d 301 ("the trait involved is not dishonesty but, rather, the intent to corrupt others"); corporal punishment of a child resulting in traumatic condition (see *People v. Brooks* (1992) 3 Cal. App. 4th 669); and felony hit-and-run (see *People v. Bautista* (1990) 217 Cal.App.3d 1 (requires constructive knowledge). Non-sexual offenses *not* indicating a readiness to do evil standard have included: simple battery (see *People v. Lindsay* (1989) 209 Cal. App. 3d 849, 855-856); simple possession of heroin (see *People v. Castro* (1985) 38 Cal. 3d 301); and assault with a deadly weapon

possession of narcotics versus its manufacture or distribution, simple possession does not include an intent to harm, offend, or corrupt another; thus, it does not *necessarily* involve moral turpitude. Accordingly, this Court should affirm the Review Department's classification of 311.11(a) as a crime which may or may not involve moral turpitude.

B. Crimes Involving Moral Turpitude Per Se Are Morally Turpitudinous in Every Instance; Violation of Section 311.11(a) Is Not In Every Instance Morally Turpitudinous.

This Court has also held that in attorney discipline matters, an offense "necessarily involves moral turpitude if the conviction would *in every case*" evidence bad moral character. (*Lesansky*, supra, 25 Cal.4th 11, citing *Hallinan*, supra, 43 Cal. 2d 243, 249 [emphasis in original].) There are at least two scenarios which a person could be convicted under section 311.11(a), and the individual's conduct would not evidence bad moral character. The first pertains to the age of the person depicted; the second pertains to the manner in which the individual came into possession of a proscribed image.

As to the first scenario, the United States Supreme Court has held that an image of a post-pubescent minor may be unlawful for purposes of state or federal child pornography law, but that in and of itself does not mean the image may shock the conscience, appeal to prurient interest, or be patently offensive. (*Ashcroft v. Free Speech Coalition*, supra, 535 U.S. at 246

(see *In re Strick* (1983) 34 Cal.3d 891). As these cases indicate, the morally turpitudinous conduct involves an act or intent to harm, offend, or corrupt others. Conversely the non-morally turptitudinous cases such as the simple possession of drugs do not involve an act or intent to harm, offend, or corrupt another, or are factually dependent. Thus it is with a violation of Section 311.11(a); it is not morally turpitudinous in every case.

("images may violate [a child pornography law], even if they do not appeal to the prurient interest, and it is not necessary that the image be patently offensive, as pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards").) Thus, if the depicted person is near the age of majority, possession of an image may be unlawful, but the image in and of itself may not be patently offensive (as images of pre-pubescent minors may be).

As to the second scenario, a person can unknowingly come into possession of an unlawful image. By way of example, it is common to receive e-mails with multiple attachments. With some mail systems such as MS Outlook, and depending on the system settings, images are not displayed until the user opens the e-mail, at which time the images would be in the user's cache. With other mail systems such as AOL's (at least the version in use in 2007), only the *first* attachment is viewable in AOL's pre-browser. Consequently, if a user receives an e-mail with multiple attachments, previews the *first* image and concludes it is lawful and based thereon elects to open the e-mail, *all* of the images attached to the e-mail would reside in the user's cache, regardless of whether the images which were not viewed in the pre-browser (that is, the second and subsequent images) were unlawful. Thus, *without* intending to do so, a user could come into possession of an unlawful image. While this possession or control may be illegal under section 311.11(a), and particularly under *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402,[4] it does not mean that a

[4] In *Tecklenburg*, the defendant was found guilty of six misdemeanor counts of knowing possession or control of child pornography in violation of section 311.11. After a lengthy appellate process, this Court transferred the matter to the appellate court to decide two issues, the second which was whether the defendant could be convicted of possessing child pornography stored in a computer's cache files absent some evidence that he was aware those files

person necessarily sought possession of unlawful material. Accordingly, this person's conduct would not inherently involve moral turpitude. This also is the opinion of the Review Department. (*See* Rev. Dept. Opn., pp. 10-11.)

C. State Statutes Impliedly Suggest Section 311.11(a) May Not Be A Serious Sexual Offense as The Term Is Used in The Case Law Under Discussion.

California's legislature has enacted several statutes that impliedly distinguish between **serious** sexual offenses and non-serious sexual offenses, including but not limited to the sex registration scheme and the ability of convicted persons to have their records expunged.[5] These statutes suggest that a violation of section 311.11(a) is not an offense that inherently involves moral turpitude.

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existed. Defendant contended that any such images were only on his computer screen, and he did not know that temporary internet files resided in his computer's cache; the court disagreed. It held that section 311.11(a) covered any computer-generated image, including "an image [] as it is displayed on a computer screen," and did *not* require "knowing possession or control of the computer's underlying data or files." (*Id.*)

Respondent's criminal attorney advised that this then new decision made section 311.11(a) a strict liability crime; thus, even deleting an unsolicited image would be unlawful possession or control because the user moused over the image to delete it. In essence, this ruling eviscerates the knowing element of section 311.11(a).

[5] Respondent does not discount the seriousness of sex offenses. Respondent recognizes that any violation of a criminal statute, including a sex-related offense, is in essence serious. Insofar as the Court has used the term "serious" to qualify "sexual offenses," *Lesansky*, supra, 25 Cal.4th 11; *In re Fahey* (1973) 8 Cal.3d 842; *In re Boyd* (1957) 48 Cal.2d 69, it suggests that a degree of gravity attaches to some offenses whereas it does not with others, at least within the context of discussions concerning moral turpitude. Thus, as used herein, the term "serious" is intended to have the same meaning as used in *In re Boyd* and its progeny.

moral turpitude.

Under Penal Code section 290, persons convicted of certain enumerated crimes are required to register. The purpose of the registration requirement is not punitive, but "*regulatory in nature*." (*In re Alva* (2004) 33 Cal.4th 254.) Although the requirement is often referred to as a lifetime requirement, the legislature crafted a means whereby it is *not* a lifetime requirement. More specifically, it enacted legislation that provides that a registrant may obtain a certificate of rehabilitation from the superior court under Section 4852.01 *et seq.* (§ 290.5, subd. (a); see *People v. Ansell* (2001) 25 Cal.4th 868, 877 & fn. 17.)

Under a 1997 amendment to section 4852.01, persons convicted of certain offenses are ineligible for a certificate of rehabilitation. (Sec. 4852.01(d).) Those ineligible include persons convicted of rape, sexual battery, and child molestation, all of which are acts involving physical contact and an intent to harm another. Notably, section 311.11(a) was *not* included in the amendment precluding rehabilitation. As this Court stated, these "provisions are consistent with the regulatory purpose to monitor convicted sex offenders, who are generally considered susceptible to recidivism, but to *end monitoring* of those who have demonstrated that their likelihood of reoffense is low." (*In re Alva, supra*, 25 Cal.4th 868 [emphasis added].)

Under Section 1203.4, a person may move to expunge his or her conviction. (Pen. C. § 1203.4, subd. (a).) In 1997, the Legislature amended section 1203.4 to make section 1203.4 relief unavailable to those convicted of certain sex offenses, including Sections 286 (sodomy), 288 (lewd and lascivious behavior), 288a (oral copulation), 288.5 (sexual abuse of child), 289 (penetration with foreign object), or 261.5 (unlawful sexual intercourse with a minor). As with the changes to section 4852.01, section

311.11(a) was *not* included in the 1997 amendment to section 1203.4 and does not preclude expungement.[6]

In making the distinction between those crimes that are eligible for a certificate of rehabilitation and for which a person may seek expungement, on the one hand, and those crimes which are not eligible for such relief, on the other, it would appear that the legislature deemed that simple possession does *not* inherently involve moral turpitude.

For all of the reasons set forth above, a violation of section 311.11(a) should not be considered a crime that inherently involves moral turpitude. Rather, as the Review Department has determined, in this matter as well as in prior matters and matters following this one, violation of section 311.11(a) is a crime which may or may not involve moral turpitude.

II. THE REVIEW DEPARTMENT CORRECTLY RULED THAT THE APPROPRIATE DISCIPLINE IN THIS MATTER IS SOME PERIOD OF ACTUAL SUSPENSION, NOT DISBARMENT

The second issue before this Court is whether the Review Department's recommended discipline of an actual suspension was appropriate. The State Bar argues that even if a violation of section 311.11(a) does not involve moral turpitude per se, the facts surrounding Respondent's conviction "clearly involve moral turpitude and no reasonable argument can be made countering" such a conclusion. (Petition, at 16.) The State Bar did not prove by clear and convincing evidence that

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[6] "Both amendments were contained in Assembly Bill No. 729 (1997-1998 Reg. Sess.); these amendments were the only provisions of the bill. (Stats. 1997, ch. 61.)" (*People v Arata* (2007) 151 Cal.App.4th 778.)

Respondent's conduct involved moral turpitude. To the contrary, the record shows that Respondent has never had an interest in children, that Respondent never had an interest in child pornography, and that Respondent never took any steps to obtain any unlawful matter. Therefore, discipline involving some period of actual suspension, with terms and conditions, is the proper disposition of this matter. As discussed below, however, there are grounds to impose an actual suspension for some period less than the 2-years recommended by the Review Department. In particular, there are numerous examples of member discipline for sexual offenses where the misconduct was far more egregious than Respondent's, but some lesser discipline than 2-years actual suspension was imposed. The only apparent ground for seeking such harsh discipline is because Respondent would not stipulate to moral turpitude. Respondent should not be punished for requiring the State Bar to prove moral turpitude.

A. The State Bar Did *Not* Prove Moral Turpitude Under the *Castro*/"Readiness to Do Evil" Line of Cases.

The State Bar has the burden of proving misconduct by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) The function of a standard of proof is to instruct the fact-finder as to the required degree of confidence in the correctness of factual conclusions in a case. (*In re Winship* (1970) 397 U.S. 358, 370.) Evidence by a clear and convincing standard requires that the proof be "so clear as to leave no substantial doubt" and must be "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Sheehan v. Sullivan* (1899) 126 Cal, 189, 193.) The State Bar did not meet its burden.

Trial Counsel introduced in evidence the record of conviction, a limited number of documents, and the testimony of Amy Wong, a forensic

Department ruled that much of the examiner's testimony was admitted in error, which ruling Respondent agrees is correct; however, even if it were admitted it would not prove that Respondent's conduct involved moral turpitude.

A record of conviction conclusively proves that each element of a crime is satisfied; however, it does not provide any additional evidence. (*Cf.*, *In re Ford* (1988) 44 Cal.3d 810, 815.) Respondent's record of conviction showed that in June 2007 he knowingly possessed or controlled an unknown number of images that were unlawful under 311.4(d). (Ex. 14.) The record did *not* show how or why Respondent came into possession of the images.

The forensic examiner testified that she examined Respondent's computer. She further testified that she found 17 images which possibly depicted someone underage. (RT, Vol. I, p. 9, *et seq.*)[7] The State Bar did *not* introduce any competent evidence as to the actual or apparent age of the persons depicted, it did *not* introduce any documents to suggest the age of the persons depicted had been analyzed, and it did *not* put on an expert qualified to speak to the depicted persons' ages.

The forensic examiner did offer testimony as to the age of the persons depicted; on multiple occasions, however, she testified that she was ***not*** qualified to speak to the ages of the individuals depicted. (RT, Vol. I, pp.

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[7] The forensic examiner testified that in her written report she had identified certain images which were of "possible" interest to the ICE case officer, but that a couple of weeks before trial Trial Counsel informed the forensic examiner that the ICE case officer would not be testifying and that the forensic examiner alone would testify at trial. Thus, the forensic examiner changed her testimony from "possible" to "appears to be." But for Trial Counsel's failure to put on other witnesses, the forensic examiner likely would not have changed her testimony at trial. For this and other reasons, the Review Department deemed the forensic examiner's testimony inadmissible.

116:23-24, 119:17.) The court allowed the examiner's testimony into evidence; the Review Department, however, held that allowing the testimony was error for two reasons: the analyst's oral testimony was not admissible to prove the contents of the images under the secondary evidence rule, and the analyst's testimony about the subject's ages depicted in the images was inadmissible because it amounted to an improper lay opinion.[8] (Rev. Dept. Opn., at 7-8.)

Even if one were to take into account the inadmissible evidence, which Respondent contends would be improper, the record would *not* support a finding that Respondent's conduct involved moral turpitude. At worst, and assuming *arguendo* the accuracy of the examiner's testimony, Respondent would have had in his possession 17 images which may or may not have depicted someone underage. There was *no* testimony, however, concerning Tanner Staging,[9] *no* testimony as to any individual's stage of development, and *no* testimony that any person depicted was prepubescent, etc. In essence, there was nothing but speculation and surmise as to the actual or apparent age of the persons depicted.

As the Review Department correctly observed: "Under these circumstances, reasonable minds could differ on whether the subjects in the

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[8] The arguments in support of and against the Review Department's ruling regarding the examiner's testimony were addressed at length in the Petition and Answer and are incorporated herein by reference.

[9] Tanner Staging (or the Tanner Scale) is a scientific method of determining developmental physical stages for males and females. It is frequently used by experts to describe the maturation of females in criminal cases. (See e.g., *People v. Kurey* (2001) 88 Cal. App. 4th 840; and see *United States of America v. Syphers* (1st Cir. 2005) 426 F.3d 461; *United States v. Hilton* (1st Cir. 2004) 386 F.3d 13, 18; *United States v. Katz* (5th Cir. 1999) 178 F.3d 368, 373-74.)

images were actually under 18 years old, particularly since the analyst did not testify that the subjects were obviously minors. (See *People v. Kurey* (2001) 88 Cal.App.4th 840, 846-847 [expert testimony relevant to material fact of minority]; *United States v. X-Citenzent Video, Inc.* (1994) 513 U.S. 64, 72, fn. 2 ["opportunity for reasonable mistake as to age increases significantly" when subjects in photos unavailable for questioning]; *United States v. Katz* (5th Cir, 1999) 178 F.3d 368, 373 [expert testimony may be necessary to prove minority when individual is post-puberty but appears young].)" (Rev. Dept. Opn., at 9.)

Returning to the United States Supreme Court's observations in *Ashcroft v. Free Speech Coalition*, it is possible that "images may violate [a child pornography law], even if they do not appeal to the prurient interest, and it is not necessary that the image be patently offensive, as pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards". The State Bar did not prove by clear and convincing evidence that the 17 images to which the forensic examiner testified appealed to prurient interest; thus, they did not prove moral turpitude. Moreover, they did not prove Respondent's conduct showed a desire to corrupt, harm, or offend another. (*Cf.*, *Ballard*, supra, 13 Cal.App.4th at 696.)

Not only did Trial Counsel *not* prove that Respondent's conduct demonstrated a readiness to do evil, was base or vile, or that he was not fit to practice law, Respondent put on unimpeached and uncontroverted evidence to the contrary. Respondent acknowledged that he had previously viewed *adult* internet pornography; however, he testified that he found child pornography repulsive and repugnant. (RT, Vol. II, at 60:23, 65:6-7.) While the court questioned Respondent's credibility on this, its rejection of

this evidence does *not* create affirmative contrary evidence. (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343.)

Respondent testified that he received two images which depicted individuals that he believed were under age, that receipt of these images was *unsolicited*, and that he immediately deleted them. (RT, Vol. II, at 61:24, 62:1.) No evidence came in to refute this testimony.

Respondent testified that he treated with Jim Hughes, LMFT, CCHT. Hughes testified that he had treated Respondent since September 2008, and based on that treatment he prepared three letters and reports. (RT, Vol. II, pp. 122:22-123:9) At trial, he confirmed the findings in these written reports; to wit, Respondent does *not* fit the profile of a pedophile, does *not* have an interest in children, and does *not* have an attraction (sexual or otherwise) to children. (*Id.*, at 123:9-147:25; Exs. Q, R, and S.) Hughes' testimony was not impeached and it was not controverted. Moreover, the court found Hughes credible. (Hrg. Dept. Rec., pp. 2-3, 7-8.)

Contrary to the State Bar's argument, the evidence supports Hughes' conclusions and Respondent's testimony. Specifically:

- The examiner testified there was *no* evidence that Respondent downloaded any images from a website dedicated to or known for child pornography. (RT, Vol. I, pp. 99:25-100:3.)

- The examiner testified there was *no* evidence that Respondent posted any images onto a public bulletin board. (RT, Vol. I, pp. 117:17-20.)

- The examiner testified there was *no* evidence that Respondent shared any images using a peer-to-peer program. (RT, Vol. I, pp. 122:20-123:3.)

- Trial Counsel stipulated that there was *no* evidence Respondent "chatted, either instant messaging or e-mailing or

otherwise communicated, with minors." (RT, Vol. I, pp. 117:1-15.)

To summarize, there was no evidence that Respondent had or has any indicia of pedophilia, that Respondent had or has any interest in or attraction to children, or that Respondent intentionally sought out to possess or any images which depicted minors. In short, the record is devoid of any evidence of moral turpitude; it shows only the inadvertent receipt of a small number of questionable images. Any finding of moral turpitude could be reached only if no weight were attached to the findings of Respondent's therapist, James Hughes, a witness whom the Review Department deemed entirely credible. (Rev. Dept. Opn., at 2-3, 7-8.) For these reasons, the Review Department correctly ruled that Respondent's conduct did not involve moral turpitude.

B. The State Bar Did *Not* Prove Moral Turpitude Under the *Lesansky*/"Fitness to Practice" Line of Cases.

In recent years, the State Bar has developed a broader concept of moral turpitude in attorney discipline cases such that, in addition to the "readiness to do evil" standard, there is what may loosely be described as the "fitness to practice law" standard. (See e.g. *Lesansky*, supra, 25 Cal.4th 11 ["child molestation"] and *In re Gossage* (2000) 23 Cal.4th 1080 ["voluntary manslaughter while under the influence"].) Under this line of cases, "Criminal conduct not committed in the practice of law or against a client reveals moral turpitude [1] if it shows a deficiency in any character trait necessary for the practice of law (such as *trustworthiness*, *honesty*, *fairness*, *candor*, and *fidelity to fiduciary duties*) or [2] if it involves such a serious breach of a duty owed to another or to society, or [3] such a flagrant

disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*Id.*, at 16 [emphasis added].) The State Bar did *not* prove moral turpitude under this line of cases.

1. The State Bar did not prove that Respondent lacks the character traits necessary for the practice of law.

The State Bar's sole witness did ***not*** testify to any of the enumerated character traits. (RT, Vols. I-IV, *passim.*) Trial Counsel also did not put in any evidence any documents that proved Respondent did or did not have these character traits. (*Id.*) Thus, the State Bar did **not** prove by clear and convincing evidence that Respondent lacked the character traits necessary for the practice of law.

Respondent, on the other hand, put in evidence that he possessed the character traits necessary for the practice of law. More specifically, Respondent put on a number of character witnesses, from within[10] and without[11] the legal community. All of the witnesses testified that

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[10] Character witnesses in the legal community: *Jerry Goddard, Esq.* (City Attorney, City of Redondo Beach [ret.]; Captain, USN [ret.], Senior Navy-Marine Corps Judge, Mediterranean-Gulf Theater during Iraq War); *Sam Bettwy, Esq.* (attorney, U. S. Department of Justice; Lieutenant Colonel, U. S. Army Reserve, Judge Advocate General Corps; currently Deputy Commander, 78th LSO); *Tim Stutler, Esq.* (attorney, U. S. Department of Justice; U. S. Army Reserve, Major, [ret.]); *Walter Schuster, Esq.* (attorney, Federal Aviation Administration; Major, U.S. Army Reserve, Judge Advocate General Corps); *Han Dao, Esq.* (attorney, City of Los Angeles; Captain, U. S. Army Reserve, Judge Advocate General Corps); and Linda Simpson, CSR (Certified Shorthand Reporter with more than 25 years).

[11] Character witness - Former Clients: *Steve Kerbel* (former client; President of insurance company doing business in 6 states); *Minta Meehan* (former client; mother of two minor children). Personal Character Witnesses:

Respondent demonstrated the character trait necessary for the practice of law; to wit, trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties. (RT, III-2:7-15:21, 64:12-65:3, 73:16.) The court concluded that these witnesses were credible. (Hrg. Dept. Rec., pp. 2-3.) Therefore, the record is that Respondent possesses the character traits necessary for the practice of law.

2. The State Bar did not prove that Respondent's misconduct constituted a serious breach of duty owed to another or to society.

The State Bar did *not* prove that the facts and circumstances surrounding Respondent's misconduct constituted a serious breach of a duty owed to another or to society. In fact, Trial Counsel did not put forward any evidence, testimonial or documentary, to support such a finding. (RT, Vol. I-IV, *passim*.) At worst, the record shows that Respondent received unsolicited two images; albeit, without an intent to harm, corrupt, or offend anyone.

Conversely, the record shows that upon receipt of the two images that Respondent believed may have been improper, Respondent immediately deleted them. (RT, Vol. II, at 60:19-24, 64:10-11, 65:19-22.) This conduct demonstrates that Respondent made an effort to uphold his duty to another and/or society. Again, even if the court questioned Respondent's credibility on this, its rejection of this evidence does *not* create affirmative contrary evidence. (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343.) As such, the court's finding is not supported by the record.

Brian Penderghast (financial industry); *Ilza Lawson* (mother of two minor children, including one special needs child).

3. The State Bar did not prove that Respondent's misconduct constituted a flagrant disrespect for the law or for societal norms.

The State Bar did *not* prove that the facts and circumstances surrounding Respondent's misconduct constituted a flagrant disrespect for the law or for societal norms. In fact, Trial Counsel did not put forward any evidence, testimonial or documentary, to support such a finding. (RT, Vol. I-IV, *passim.*) Any such finding would therefore be improper.

Conversely, the record shows that Respondent did respect the law and societal norms. Because Respondent understood *Tecklenburg* to mean that even the act of deleting the unsolicited images constituted "control" within the meaning of 311.11(a), in essence making it a strict liability crime, Respondent pled guilty to a single count. This demonstrates a respect for the law.

Further, the therapist with whom Respondent treated concluded that Respondent was not a pedophile, was not interested in children, was not interested in child pornography, and was repulsed by the idea. (RT, Vol. II, at 103:14 *et seq*; Exs. Q, R, and S.) Respondent testified that he found child pornography repugnant. (RT, Vol. II, at 187:15.) This testimony was not impeached and it was not controverted. Thus, the record shows that Respondent did respect the law and societal norms. As such, the court's finding was not supported by the evidence.

4. The State Bar did not prove that Respondent's conduct would likely undermine public confidence in and respect for the legal profession.

The State Bar did *not* prove that knowledge of Respondent's conduct

would be likely to undermine public confidence in and respect for the legal profession. In fact, Trial Counsel did not put forward any evidence to support such a finding. (RT, Vol. I-IV, *passim.*) Respondent, on the other hand, put on clear and convincing evidence that the public's confidence in and respect for the legal profession would not be undermined. More specifically, Respondent put on several character witnesses from the legal community and the lay community. The totality of their testimony supports only one conclusion – that public confident is not undermined.

The testimony of friends, associates, and members of the bar is entitled to careful consideration and should weigh heavily in the scales of justice. (*Resner v. State Bar* (1967) 67 Cal.2d 799, 805-806; *Werner v. State Bar* (1954) 42 Cal.2d 187, 196-197; *Preston v. State Bar* (1940) 28 Cal.2d 643, 650-651.) With respect to lay witnesses, one former client, Steve Kerbel, is currently the president of an insurance company operating in six states. Mr. Kerbel stated that he would only do business in California if Respondent were to represent him. (Ex. "EE.") Another former client, Minta Meehan, had retained Respondent to represent her in a personal injury matter. She testified that she substituted out Respondent only because of his interim suspension, and that she would re-retain Respondent upon the lifting of his suspension. Ms. Meehan also is the mother of two minor children, and she testified that she continued to have respect for Respondent notwithstanding Respondent's conviction based on her knowledge of Respondent. (RT, Vol. III, at 44:15 *et seq.*)

These witnesses testimony was neither impeached nor controverted. Moreover, the court concluded that these witnesses were credible. (Hrg. Dept. Rec., pp. 2-3.) Thus, the record is that Respondent's conviction did *not* result in the public's confidence in and respect for the legal profession being undermined.

To summarize, Trial Counsel put on only one witness - the computer technician - and that witness did *not* testify as to any of the character traits articulated in *Lesansky*. Trial Counsel similarly did *not* put into evidence any documents addressing the character traits articulated in *Lesansky*. Accordingly, the State Bar did not prove by clear and convincing evidence that Respondent lacks the characters of someone with good moral character.

The court's finding - in the disjunctive - that Respondent's conduct involved a serious breach of duty owed to another *or* to society, *or* such a flagrant disrespect for the law *or* for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession, *see* Decision, p. 9:21-26, was not proven by any evidence that constitutes moral turpitude under either the *Castro* or the *Lesansky* line of cases; rather, the court's findings and conclusions were the result of surmise, speculation and bias. For these reasons, the Review Department correctly determined that the court's finding of moral turpitude was unsupported; that the State Bar did not prove Respondent's conduct involved moral turpitude. (Rev. Dept. Opn., at 10-11.)

C. Discipline Involving Some Period of Actual Suspension Is Appropriate.

In determining appropriate discipline, this Court is guided by (1) the recommendation of the Review Department, (2) the discipline this Court has imposed for similar misconduct in past cases, and (3) the Standards for Attorney Sanctions for Professional Misconduct. (*In re Brown* (1995) 12 Cal.4th 205, 217 [citations omitted].)

The Review Department recommended that Respondent be disciplined by a period of actual suspension, not disbarment. Respondent concurs with the recommendation; albeit, Respondent argues below that the

proposed 2-year actual suspension is inappropriate, and that some lesser actual suspension should be imposed (notwithstanding that Respondent has already been on interim suspension for 3½ years).

This Court has not previously imposed discipline on a member convicted of a violation of section 311.11(a) who adjudicated the matter in the State Bar Court; rather, it has only approved discipline imposed by way of ADP or stipulation. A review of other ADP and/or stipulated cases frames the appropriate discipline in this matter. In *In re Bornstein* (#65256) [August 2006], the member was convicted of one count of 311.11(a). The member had purchased access to a website that featured images of child pornography, and law enforcement officers uncovered ***9,500*** *images of child pornography* on the member's computers. Further, the member was then a deputy attorney general for the State of California, and had stated that he was attending a hearing when forensics showed that he was at home watching a pornographic movie he had downloaded (as such, Bornstein's moral turpitude arose out of his dishonesty to the investigators). For this misconduct, Bornstein received a 3-year actual suspension.

In *In re Fetterman* (#189990) [September 2007], the member was convicted of one count of 311.11(a). The member had participated in an online chat wherein he expressed a sexual interest in children and child pornography; he had sent photos of adult males having sex with minors; and he had child pornography on computers at his residence *and* his law office. In addition to this criminal conviction, the member was involved in two cases involving misconduct (specifically, failure to refund unearned fees, provide an accounting of fees, respond to a client's status inquiries, perform legal services competently, or cooperate with the Bar's investigation). For this misconduct, including his demonstrated sexual interest in children,

Fetterman received a 1-year actual suspension.[12]

In *In re Stocker* (#106382) [November 2009], the member was convicted of one count of 311.11(a). The member stipulated to downloading child pornography at his office; however, there was no evidence that Stocker participated in the conduct found in *Fetterman* or *Bornstein*; i.e., the record did not show that he went to websites which featured child pornography, he did not participate in chat rooms focused on child pornography and/or children, and he did not purchase child pornography. For this misconduct, Stocker received an actual 30-day suspension.

In 2011, concurrent with the filing of its petition for review in this matter, the State Bar petitioned this Court to overturn Stocker's discipline and to disbar him. This Court denied that petition.

Of these three cases, the most comparable matter is *Stocker*; albeit, with two significant differences. Like Stocker, there is *no* evidence that Respondent accessed child-centric websites, there is *no* evidence that Respondent participated in online chats involving or concerning children or child pornography, there is *no* evidence that Respondent purchased child pornography, and there is *no* evidence of a large number of unlawful images. (RT, Vol. I, pp. 99:25-100:3, 117:1-15, 17-20, 122:20-123:3.)

The two significant differences between Stocker and Respondent are that Stocker's conduct took place in a law office, and Stocker stipulated to downloading child pornography. Conversely, all of Respondent's conduct was private. More importantly, there is *no* evidence that Respondent

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[12] The member was subsequently disbarred as a result of additional misconduct. At that time he was disbarred, he had had *four* previous disciplines and due to his failure to comply with former Rule 955 (now Rule 9.20).

intentionally downloaded child pornography. (RT, Vols. I-IV, *passim.*) Rather, receipt of it was unintentional. (*Id.*)

Respondent's misconduct is not comparable to Bornstein or Fetterman, yet these members received a 3-year and 1-year actual suspension. Thus, an appropriate discipline for Respondent would be some actual suspension less than that imposed on Bornstein and Fetterman.

Respondent's misconduct may be seen as on a par with that of Stocker, yet Stocker stipulated to downloading child pornography -- a *volitional* act -- whereas Respondent did *not* knowingly download any material. Thus, an appropriate discipline for Respondent would be an actual suspension equivalent to that imposed on Stocker.

Two other discipline proceedings for members convicted of sexual offenses shed additional light on discipline inconsistency, and the State Bar's overreach in Respondent's case. In *In re Kaye* [#171160], the member was convicted for two counts of violating §647(j)(3)(a) (*secretly filming a person*) and two counts of 647(j)(1) (*peeking through a private area*). The hearing department found that this conduct involved moral turpitude, and that there was considerable aggravation (multiple acts of misconduct and harm to public/invaded privacy). Notwithstanding the finding of moral turpitude and the finding of multiple factors in aggravation, the hearing department recommended a 1-year actual suspension.

In *In re Patterson* [#220037],[13] the member was convicted of lewd conduct, the factual predicate which included "willfully, unlawfully and intentionally [] exposing and masturbating his penis in the direct view and presence of two females." The State Bar stipulated to a 2-year actual suspension.

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[13] State Bar website #220037; ADP Stipulation #220087.

The crimes for which Patterson and Kaye were convicted required intent to harm, corrupt, or offend others, *Ballard*, supra, 13 Cal.App.4th at 696, whereas the State Bar did not prove such intent on the part of Respondent. Further, a 1-year actual suspension was imposed in Kaye, and a 2-year actual suspension in Patterson, whereas, the State Bar contends a 2-year actual suspension is insufficient for Respondent.

As demonstrated by the discipline imposed on Fetterman, Bornstein, Kaye and Patterson, the State Bar seeks imposition of discipline grossly disproportional to that of others members whose conduct involved moral turpitude and which caused harm. In short, this matter is an overreach by the State Bar. For all of these reasons, an actual suspension of 90-days would be appropriate.

D. The Discipline Requested by the State Bar of Disbarment Would Not Serve the Stated Purpose of State Bar Discipline.

The purpose of attorney discipline is **not** to punish the attorney, but to protect the public, the courts and the legal profession, to preserve public confidence in the legal profession and to maintain high professional standards for attorneys. (Std. 1.3; *Lesansky*, supra, at 14; *Chadwick v. State Bar* (1989) 49 Ca.3d 103, 111.) Based on the admissible testimony and other evidence before the court, Trial Counsel did not prove by clear and convincing evidence that the purpose of attorney discipline would be served by disbarring Respondent.

1. The discipline requested by the State Bar would not serve the stated purpose of protecting the public, the courts, and the legal profession.

The first prong of the purpose for sanctions is to protect the public, the courts, and the legal profession. (Std. 1.3; *Lesansky*, supra, at 14.) There is nothing in the record to support the conclusion that it was or is necessary to impose discipline, let alone disbar Respondent, to protect the public, the courts, or the legal profession.

There are any number of ways in which a Member can abuse his position as an attorney and harm the public. Accordingly, the State Bar and Supreme Court routinely discipline and disbar attorneys who cause injury to the public; see e.g.: client trust violations (*In re Conner* (Review Dept. 2008) 2008 Calif. Op. LEXIS 1); improper business transactions with clients (*In re Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615); failing to diligently service clients (*In re Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547); *cf.*, having sex with clients (*Florida Bar v. Scott* (Fla. 2002) 810 So. 2d 893; 2002 Fla. LEXIS 166 [attorney disbarred-forced client to engage in sexual conduct with him for reduction of fee).

This Court also has not hesitated to impose discipline, including disbarment, on attorneys whose conduct harms the courts; e.g.: disrespect to court (*In re Field* (Review Dept. 2010) 2010 Calif. Op. LEXIS 1); prosecutorial misconduct (*id.*).

Finally, this Court has not hesitated to impose discipline, including disbarment, on attorneys whose conduct detrimentally impacts the legal profession; see e.g.: *In re Hanley* (1975) 13 Cal.3d 448, 454 [conviction for bribing witness not to testify "impugned the integrity of the judicial system" justified disbarment]; *In re Allen* (1959) 52 Cal.2d 762, 768 [conviction for soliciting witnesses to commit perjury "inherently" called for disbarment];

and see *In re Field* (Review Dept. 2010) 2010 Calif. Op. LEXIS 1 [conviction for prosecutorial misconduct]; *In re Sullivan* (Review Dept. 2010) 2010 Calif. Op. LEXIS 2 [conviction for conspiracy to obstruct justice].

In furtherance of the objective of protecting the public, the courts, and the legal profession, an obvious requirement is that there is some nexus between the Member's conduct and his/her position as an attorney. (*Lesansky*, supra, 25 Cal.4th at 14; *In re Johnson* (1994) 1 Cal.4th 689, 698; *cf., Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 699 fn. 4; *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 227.) Notably, Respondent's conduct was and is unrelated to the practice of law; it did *not* arise out of or involve any interaction with clients or the public at large. Thus, there was and is no nexus between Respondent's conduct and the stated objective of protecting the public, the courts, and the legal profession.[14] Therefore, to impose the discipline requested by the State Bar would *not* serve the stated objective of protecting the public.

2. The discipline requested by the State Bar would not serve the stated purpose of preserving public trust in the legal system.

The second prong of the purpose for sanctions is to preserve public trust in the legal profession. (Std. 1.3; *Lesansky*, supra, at 14.)

Conduct that undermines public trust in the legal system is conduct that calls an attorney's professional integrity into question. Offenses that

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[14] The argument herein relates *solely* to the purpose of protecting the public, the courts, and the legal profession. Whether Respondent's conduct warrants discipline, even if moral turpitude is *not* proven and even if the conduct occurred outside the practice of law, is addressed elsewhere in this Brief.

have been so recognized regardless of whether they are committed in the course of an attorney's practice of law are: perjury (*In re Kristovich* (1976) 18 Cal.3d 468), crimes involving dishonesty for personal gain (*In re Fahey* (1973) 8 Cal.3d 842, 849); falsifying documents to be used in evidence (*In re Dedman* (1976) 17 Cal.3d 229); forgery (*In re Bogart* (1973) 9 Cal.3d 743; and intent to defraud (*Hallinan*, supra, 43 Cal.2d 243).

Trial Counsel did *not* put on any evidence to show that Respondent's conduct would undermine the public's trust in the legal system.

Conversely, Respondent **did** put on evidence to show that the public's trust in the legal system is preserved, notwithstanding Respondent's conduct and/or his conviction. Respondent's character witnesses included attorneys who have referred him business, and would continue to refer him business, see RT, Vol. III-14:16-15:21; a court reporter who considers Respondent one of the few attorneys to whom she is willing to refer business, id., at I-137:1-21; a former client and current president of an insurance company operating in six states who would only do business in California if Respondent would represent him, see Respondent's Ex. "EE"; a former client involved in a personal injury matter that would re-retain Respondent upon the lifting of his suspension, see RT, III-44; and two mothers, each of whom have minor children (including one special needs child), who testified that they have complete trust in Respondent, individually and in his position as an attorney (RT, IV-2:8). These witnesses' testimony, which was neither impeached nor controverted, and which the court found credible, is the only evidence on the record that directly or indirectly touches upon the public's trust in the legal system. Their testimony, combined with Trial Counsel's absence of evidence to the contrary, is clear and convincing evidence that the discipline requested by the State Bar would not serve the stated objective of

preserving the public in the legal profession.

3. The discipline requested by the State Bar would not serve the stated purpose of maintaining high professional standards.

The final prong of the purpose for sanctions is to maintain high professional standards. (Std. 1.3; *Lesansky*, supra, at 14.)

The State Bar and this Court routinely discipline and disbar attorneys who fail to maintain high professional standards; see e.g.: prosecutorial misconduct (*In re Field* (Review Dept. 2010) 2010 Calif. Op. LEXIS 1); attorney cajoled witness into giving statement (*In re Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798); attorney communicated directly with opposing party whom he knew to be represented by counsel (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70); attorney communicated directly with opposing party (*Crane v. State Bar* (1981) 30 Cal.3d 117); and attorney had opposing party sign settlement papers (*Turner v. State Bar* (1950) 36 Cal.2d 155).

Trial Counsel did **not** put on any evidence as to whether Respondent's conducted impacted the maintenance of high professional standards. Thus, Trial Counsel did not show by clear and convincing evidence that this purpose would be served by imposing discipline on Respondent.

Conversely, Respondent **did** put on evidence that Respondent's conduct would not affect high professional standards. As set forth in the preceding section, character witnesses that are members of the Bar would continue to refer business to him, a court reporter would refer business to him, and past clients would again retain Respondent to represent them. Therefore, to impose discipline against Respondent would *not* serve the stated objective of maintaining high professional standards.

E. The Findings and Conclusions Concerning Credibility, Candor and the Factor in Aggravation Were Erroneous and Unsupported.

The court made certain findings concerning Respondent's candor and credibility and based thereon determined that there was a factor in aggravation, which factor largely eviscerated all of the factors in mitigation that were either proven or stipulated to by Trial Counsel; the Review Department largely echoed the court's findings and conclusions. Even the greenest attorney knows that there is a steep bar to surmount when challenging the findings of a trier of fact, and not to bother unless the findings are so egregious or so tainted. Such is the case herein. The court's findings and conclusions concerning candor, credibility, and the factor in aggravation are the result of the poisonous tree, are irrelevant under Section 352, are unsupported by the record, and erroneous as a matter of law. Therefore, the court's findings and conclusions on these matters should be disregarded.

1. Evidence concerning Respondent's military resignation and the findings and conclusions therefrom should be disregarded.

The court determined that Respondent lacked credibility and candor in connection with his discharge from the military. (Hrt. Dpt. Dec. at 8, fns. 7, 8.) All of the testimony and evidence concerning Respondent's discharge should have been excluded because the admitted exhibits were obtained improperly, if not illegally.

Trial Counsel sought to introduce Exhibit No. 15, a letter from the United States Army Human Resources Command (HRC), Exhibit No. 16, an

Army Order, and Exhibit No. 17, portions of Army Regulations 135-175. The Letter and Regulations were admitted; the Order was excluded. (RT, VI, pp. 70, 102.)

Exhibit 15 related to Respondent's resignation. The bottom of the document contains a legend, advising that the document "is protected from release by the Privacy Act (5 U.S.C. § 552a)." The federal Privacy Act prohibits the disclosure of a record about an individual from a system of records absent the written consent of the individual, unless the disclosure is pursuant to one of twelve statutory exceptions. Trial Counsel did *not* use formal channels to obtain Exhibit 15; she did not propound written discovery to Respondent, she did not serve anyone with a subpoena duces tecum, and she did not write the federal government for Respondent's military record. Similarly, the Army did *not* request and Respondent did *not* provide written consent to release the letter (because he did not know of its existence). Moreover, no statutory exception applied. Therefore, Trial Counsel improperly obtained this document in violation of federal law.

Trial Counsel's use of Exhibit 15 is another example of Trial Counsel's trial by ambush. If Trial Counsel wanted the court to have a complete and accurate picture of Respondent's discharge, she should have availed herself of the prescribed discovery procedures so that all relevant information was available. As it is, Trial Counsel only attempted to introduce the admitted letter and the excluded order, but no other part of Respondent's Military Personal File (MPF). It begs the question why she did not offer other parts of his MPF, including all documents relating to his resignation.

Further, Trial Counsel waited until the last part of the last day at trial to use this record, when the court had signaled the proceeding was shortly to

end, and no further witnesses would be permitted. If Trial Counsel had wanted to develop an accurate context for military administrative proceedings in general, and Respondent's resignation in particular, she could have examined any of the other witnesses on the subject. Specifically, Respondent had nine character witnesses; Trial Counsel made no effort to examine these witnesses to determine whether Respondent had ever discussed his resignation with them. (RT, Vols. I-VI, *passim*.) More importantly, four witnesses were from Respondent's military unit: LTC Bettwy, MAJ Stutler, MAJ Schuster, and CPT Dao. (RT, Vols. II-71:16, III-2:7, III-73:16.) Each of these witnesses is a commissioned officer who served alongside Captain Respondent, and could have provided the necessary context for military justice and administrative, judicial and discharge proceedings. (*Id.*) The context was *not* provided, and the findings and conclusions reached are inaccurate or unsupported.

As to the inaccurate and unsupported findings and conclusions, the Review Department observed that "Respondent lacked candor at trial because he misled the court about his *dishonorable discharge*." (Rev. Dept. Opn., at 11 [emphasis added].) There are five categories of military discharge: Honorable, General, Other than Honorable, Bad Conduct Discharge, and Dishonorable Discharge. The first three categories are considered *administrative separations*; they are not imposed at courts-martial and are not considered punitive in nature; conversely, the latter two categories are punitive in nature. A Dishonorable Discharge can *only* be adjudged by a general court-martial and is a separation under dishonorable conditions. Moreover, commissioned officers (such as Captain Respondent) *cannot* receive a dishonorable discharge. Rather, if an officer is discharged by general courts-martial, they receive a dismissal notice. (Army Reg. 135-175, §§ 2-1 et seq.; *cf.*, AR 635-200, 15-180.) As

the record reflects, Respondent did *not* have a courts-martial, and did *not* receive a dismissal notice. Thus, the court's finding as to Respondent's testimony about his discharge, and the Review Department's concurrence, are unsupported by the evidence and, in any case, incorrect as a matter of law.

Furthermore, the finding that Respondent's testimony concerning his discharge lacked candor and credibility is unsupported by the record. Even if Respondent's testimony "was less than fully candid with the Court, his lapses of candor were not so egregious as to require a finding that Standard 1.2(b)(vi) applied." (*In re Deierling* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 552.) Respondent testified that there "were a number of factors" that led to his discharge. (RT, IV-67:8-12.) The fact that Trial Counsel's examination and the court's focus was on one factor does not detract from the fact that Respondent testified that there was more than one factor. Further, Respondent did testify that his resignation was in part due to the commencement of an administrative separation proceeding. (RT, IV-74:2-16.) Thus, Respondent did *not* mislead the court as to the nature and grounds of the administrative separation; rather, the court narrowly focused on only part of the testimony.

Similarly, the court ruled that Respondent lacked credibility when he testified he did not open the letter from the Army concerning his discharge. (Hrg. Dept. Rec., p. 8, fn. 8.) The State Bar did *not* introduce any evidence whether Respondent opened the letter, how he received it, or how the nature of his resignation was communicated to him. (RT, *passim.*) Trial Counsel could have subpoenaed any number of witnesses, including, but not limited to, CPT Rifkin, Respondent's military lawyer, who received the letter; she also could have examined the four military witnesses mentioned above about

their knowledge of how the letter was received. Trial Counsel, however, did *not* conduct any discovery and did not conduct an examination of those witnesses knowledgeable of the matter. Consequently, there is no evidence to disprove Respondent's testimony that he did not receive the letter (because he was incarcerated at the time), or that CPT Rifkin received the letter, or that CPT Rifkin simply advised Respondent that his resignation was accepted. (RT, IV-90:15-92:7.)

Respondent, conversely, put on evidence to support his testimony. Specifically, Respondent's therapist, James Hughes, observed that Respondent has an "avoidant personality." (RT, IV-68:15-16.) It follows that it would have been difficult for Respondent to resign from the military after 17 years of dedicated service and that an avoidant personality would not open a letter which he thought might contain disheartening news and, therefore, that he simply accepted the advice of his JAG that his resignation had been accepted. The court found Hughes credible. (Hrg. Dept. Rec., pp. 2-3, 7-8.) Thus, the court's findings on this matter are based on speculation and surmise; the court's conclusion that there is a single factor in aggravation should be disregarded.

Finally, the Review Department's charge to the hearing department was to determine whether the facts and circumstances surrounding Respondent's misconduct involved moral turpitude. The misconduct occurred in ***2007***; Respondent's military resignation was tendered in ***2009***. Thus, the court's finding about candor relates to conduct **years** *after* the misconduct that is the subject of this disciplinary proceeding. In essence, the court's finding and follow on conclusion was a thin reed grasped by a biased court to recommend disbarment.

Because Respondent's military records were obtained improperly, the

findings were inaccurate as a matter of law, the findings are not supported by the record, and the findings are irrelevant as to conduct in 2007, the Review Department should have disregarded the findings concerning Respondent's discharge and not considered it a factor in aggravation.

III. CONCLUSION

For all of the foregoing reasons, Respondent Gary Douglass Grant respectfully requests that as to Issue No. 1, this Court rule that a conviction for violation of Section 311.11(a) is a crime which may or may not involve moral turpitude, and as to Issue No. 2, this Court rule that the appropriate discipline to be imposed on Respondent is an actual suspension of 90 days, with the terms and conditions set forth by the Review Department.

Respectfully submitted,

Dated: February 4, 2013 LAW OFFICES OF MICHAEL G. YORK

By: _____
Michael G. York
Attorney for Respondent
GARY DOUGLASS GRANT

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 8.520(c), CALIFORNIA RULES OF COURT

In accordance with rule 8.520(c), California Rule of Court, the undersigned hereby certifies that this Opening Brief on the Merits contains 11,757 words, as determined by the word processing system used to prepare this brief, excluding the tables, the cover information, the signature block, and this certificate.

Respectfully submitted,

DATED: February 3, 2013

LAW OFFICES OF MICHAEL G. YORK

By: _____
Michael G. York
Attorney for Respondent
GARY DOUGLASS GRANT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of eighteen and not a party to this action. I am employed in the County of Orange, State of California. My business address is 1301 Dove Street, Suite 1000, Newport Beach, California 92660.

On February 4, 2013, I served the foregoing document described as BRIEF on the interested parties:

[X] (BY MAIL): By placing [ ] the original [X] the number of true and correct copies thereof set forth on the attached list in envelopes addressed as set forth on the attached list, sealing them, and placing them for collection and mailing on that date with postage thereon fully prepaid following ordinary business practices. I am ''readily familiar'' with the business' practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service in Newport Beach, California on that same day, in the ordinary course of business. I am aware that on motion of the party served, service is invalid if postal cancellation date or postage meter date is more than (1) day after date of deposit for mailing in the affidavit.

[ ] (BY PERSONAL SERVICE): By placing a true and correct copy thereof in an envelope(s) addressed as set forth on the attached list, and sealing it. I delivered such envelope(s) by hand to the office(s) of the addressee(s).

[ ] (BY OVERNIGHT DELIVERY): By placing a true and correct copy thereof in an envelope(s) addressed as set forth on the attached list, sealing it, and placing it for collection and delivery by an express service carrier providing for overnight delivery, with delivery fees paid or provided for.

[X] (BY EMAIL): By transmitting a true and correct copy via email to the Office of General Counsel as set forth on the attached list. The transmission was reported as complete and without error.

[X] STATE - I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: February 4, 2013

MICHAEL G. YORK

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